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Recent Decisions

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RECENT DECISIONS

CONFLICTS—Grouping of Contacts—*Babcock* restricted in application to cases where both parties are residents of New York—*Long v. Pan American World Airways* (N. Y. 1965)

This action, arising out of an airplane crash was brought against Pan American for the wrongful death of two passengers, Long and Grieco.[1] The defendant moved to dismiss the complaint on the ground that, since the accident occurred in Maryland, the law of that state should govern. A Maryland statute specified those persons who could bring an action for wrongful death and the plaintiffs were not among those enumerated.[2] The Supreme Court of New York denied the motion.[3] On appeal to the appellate division, *held*, reversed. The grouping of contacts doctrine adopted in *Babcock v. Jackson*[4] does not entirely supersede the traditional vested rights theory[5] in the choice of law area but operates only in situations where both parties are residents of New York. *Long v. Pan American World Airways*, 260 N.Y.S.2d 750 (App. Div. 1965). (3-to-2).

The restriction placed upon the *Babcock* doctrine appears to be unwarranted. Although the grouping of contacts theory has been totally rejected by some states,[6] it appears that *Long* represents the first attempt to restrict the actual scope of the doctrine.[7]

The rationale behind the narrow interpretation of *Babcock* was that the grouping of contacts theory tended to encourage forum shopping.[8] The effect of such practice was greatly em-

1. G. Leroy Long, Atha M. Cooper and W. Donald Sparks as executors of the estate of Clyde W. Long, deceased; and, Joseph J. Grieco and Louis A. Grieco as administrators of the estate of Ernest L. Grieco, deceased, as plaintiffs-respondents.

2. MD. ANN. CODE, art. 67, § 4 (1957).

3. See Long v. Pan Am. World Airways, 260 N.Y.S.2d 750 (App. Div. 1965).

4. 12 N.Y.2d 473, 191 N.E.2d 279 (1963). See Auten v. Auten, 308 N.Y. 155, 124 N.E.2d 155 (1954); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964).

5. *E.g.*, Poplar v. Boujois, Inc., 298 N.Y. 62, 80 N.E.2d 334 (1948).

6. *E.g.*, Friday v. Smoot, 211 A.2d 594 (Del. 1965).

7. *E.g.*, Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese, *Comments on Babcock v. Jackson, A recent Development in Conflict of Laws*, 63 COLUM. L. REV. 1212 (1963); Sparks, *Babcock v. Jackson—A Practicing Attorney's Reflections upon the Opinion and its Implications*, 31 INS. COUNSEL J. 428 (1964).

8. *Long*, 260 N.Y.S.2d 750 (App. Div. 1965).

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phasized in *Long* because the court was asked to choose between the laws of two sister states, Maryland and Pennsylvania. The accident occurred in Maryland, but all of the significant contacts lay in Pennsylvania.[9] The plaintiff could have served the defendant with process in either Maryland, Pennsylvania or New York but chose the latter to gain the advantage of that state's adoption of the grouping of contacts theory.[10]

Admittedly, the theory opens the door to forum shopping, but New York has faced the problem in the past and done nothing to discourage such practice.[11] There is, however, inconsistency in allowing the possibility of forum shopping and at the same time decrying the unfairness of the vested rights doctrine on the ground that the applicable law is selected by a circumstance which is purely fortuitous, the place of the accident.[12] The same disadvantage exists when the grouping of contacts theory is used to determine which law governs, as the place of residence of the defendant is just as fortuitous as the place of the accident. This is particularly true in the case of an unintentional tort because the defendant is not "selected" with a view toward his residence for purpose of a future suit. That the anomaly exists cannot be doubted.

The reason behind the willingness of the various courts to overlook the effect of one fortuitous circumstance while in the same breath condemning the effect of another equally fortuitous can easily be seen. Applying the law of the place of the tort often results in the application of the law of a state which has no connection with the parties involved other than that the accident occurred within its borders. Such a state has little concern with the effect of the outcome of the suit. On the other hand, in the

9. The deceased was a Pennsylvania resident, the round trip ticket was bought in Pennsylvania, the flight was to originate and terminate in Pennsylvania and the deceased's survivors and beneficiaries of the action were Pennsylvania residents.

10. No other theory appears logical as no claim was made that New York law applied and the plaintiff could have served process on the defendant in either Pennsylvania or Maryland.

11. Keller v. Greyhound Corp., 244 N.Y.S.2d 822 (Sup. Ct. 1963). A comment on this case was that "the ramifications flowing from decisions of this type are certainly enough to unnerve the most fearless insurance company...." O'Rourke, *Analysis of the Contacts Test; A Numerical Evaluation of Babcock v. Jackson,* 11 PRAC. LAW. 87 (1965).

12. *E.g.,* Seguros Tepeyac S. A. v. Bostrum, 347 F.2d 168 (5th Cir. 1965); Babcock v. Jackson, 12 N.Y.2d 473, 191 N.E.2d 279 (1963); *Griffith, supra* note 4; Cavers, Cheatham, Currie, Ehrenzweig, Leflar and Reese, *Comments on Babcock v. Jackosn, A Recent Development in Conflict of Laws,* 63 COLUM. L. REV. 1212 (1963).

same situation, a state which is vitally concerned with the outcome and the effect it will have on its citizens is given no control over the litigation. Further, persons are subjected to laws they have no power to formulate or alter.[13] In contrast, forum shopping does not produce such undesirable results, but results in the application of the law of the state which has the greatest interest in the outcome of the litigation.[14] In addition, as Judge Rabin points out in his dissenting opinion in *Long*, restricting the application of *Babcock* to cases involving only New York residents may well result in a person being unable to take advantage of the law of his own state.[15]

> Let us assume that both parties in this case were New York residents, that the air tickets were purchased in Pennsylvania, the flight originated and terminated in Pennsylvania and all other relationships arose in Pennsylvania. In such a case it seems that the majority of this court would invoke the *Babcock* doctrine and hold Pennsylvania law to be applicable. If, however, the plaintiffs were not residents of New York but rather, as here, residents of Pennsylvania, and all other factors the same, the majority of this court would and does hold that Pennsylvania law is inapplicable. Thus we reach the anomalous result that a New York resident would get the benefit of the law of Pennsylvania, while a Pennsylvania resident would not be permitted to invoke the law of his own state.[16]

ROBERT W. DIBBLE, JR.

13. Emery v. Emery, 45 Cal.2d 421, 289 P.2d 218 (1955).
14. See authorities cited *supra* notes 4, 7 and 12.
15. *Long*, 260 N.Y.S.2d 750 (App. Div. 1965).
16. *Id.* 755.

CONSTITUTIONAL LAW—Bill of Attainder — Federal statute forbidding communists to hold union office an unconstitutional bill of attainder—*Brown v. United States* (Sup. Ct. 1965).

Respondent, an avowed member of the Communist party, was convicted under section 504 of the Labor-Management Reporting and Disclosure Act of 1959[1] of serving as a trade union officer while a communist. The conviction was vacated by the Court of Appeals for the Ninth Circuit.[2] On appeal to the Supreme Court, *held*, affirmed (on results). A statute which makes criminal the holding of union office by a Communist is an unconstitutional bill of attainder as forbidden by article I, section 9. *Brown v. United States*, 85 Sup. Ct. 1707 (1965). (5-to-4).

A bill of attainder is a legislative act which declares an individual or group guilty of an offense and imposes a penalty of death. Any similar act which decrees a lesser sentence is strictly termed a bill of pains and penalties. Thus, in either case the individual or group so singled out by the legislature is denied a trial jury as well as the procedural protections of courts of law.[3] The example of parliamentary abuses in enacting such bills for vindictive political reasons led the framers of the American Constitution to prohibit both to the federal[4] and state legislatures[5] the bill of attainder power. It has been assumed from as early as the case of *Fletcher v. Peck*[6] that the constitutional provision against the enactment of bills of attainder encompassed bills of pains and penalties as well.

The post-Civil War cases of *Cummings v. Missouri*[7] and *Ex parte Garland*[8] indicated the Court's never-to-be-departed-from

1. (a) No person who is or has been a member of the Communist Party... shall serve...
   (1) as an officer, director, trustee, member of any executive board or similar governing body, business agent manager, organizer or other employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization... during or for five years after the termination of his membership in the Communist Party...
   (b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
73 Stat. 536 (1939) 29 U.S.C. § 504 (Supp. IV, 1958).
2. Brown v. United States, 334 F.2d 488 (9th Cir. 1965).
3. See generally CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1789, 90-161 (1956).
4. U.S. CONST. art. I, § 9.
5. U.S. CONST. art. I, § 10.
6. 10 U.S. (6 Cranch) 87, 138 (1810).
7. 71 U.S. (4 Wall.) 277 (1867).
8. 71 U.S. (4 Wall.) 277 (1867).

view of the bill of attainder provision as a broad guarantee against the legislature's sitting as a court.

In *Cummings*, a priest of the Roman Catholic Church was convicted of practicing as a minister without having taken an oath of loyalty to the state government as required by the Missouri Constitution of 1865. The test oath, which was prescribed for the practitioners of some thirty-odd professions of public trust, required the taker to swear that he had never adherred to the states of the Confederacy in any of several particulars. In *Garland*, an attorney who had served as a senator to the congress of the Confederacy was barred from practice before the courts of the United States by a federal statute which imposed a similar oath. Against claims that the state and federal governments had strong interests in having loyal citizens in positions of trust and that thus the oaths were valid regulatory devices, the Court in a pair of five-to-four decisions read the oath requirements as a roundabout punishment for opposition to the United States in the then-recent hostilities:

> The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment. . . .[9]

Thus, where a statute could be taken to inflict manifest punishment on easily ascertainable individuals for legislatively determined guilt of crimes, the act would be held unconstitutional as a disguised bill of attainder. However, if a statute merely sought to regulate a given calling with no purpose to punish the practitioners, the fact that it incidentally inhibited certain individuals or a class would not require a holding of unconstitutionality.[10]

In the Second-World-War case of *United States v. Lovett*[11] the Court's view of bill of attainder as applied in *Cummings* and

9. Cummings v. Missouri, 71 U.S. (4 Wall.) 227, 320 (1867).

10. Hawker v. New York, 170 U.S. 189 (1898); Dent v. West Virginia, 129 U.S. 114 (1899), where the petitioner argued that the licensing statute was a bill of attainder. The Court did not directly decide the point. The case is generally taken for the implicit pro-position that no bill of attainder was presented by the facts.

11. 328 U.S. 303 (1945).

Garland was reaffirmed, again in a five-to-four decision. Section 304 of the Urgent Deficiency Appropriation Act of 1943[12] in effect stripped three named government employees of their positions by a provision which prevented the payment of their salaries until they should be reappointed and confirmed by Congress. The three employees along with some sixty others had been the subject of a congressional investigation into alleged subversive activities. After the passage of the act the three employees remained at their positions as before and when the salaries were not forthcoming they brought action in the Court of Claims and were granted judgment in a plurality opinion.[13] The Supreme Court affirmed the result by holding the act to be a bill of attainder. Rejecting the argument that the appropriation act was an exercise of the plenary power over the purse and thus immune to attack, the Court through the opinion of Mr. Justice Black held the singling out of three individuals for alleged offenses and the imposition of penalties on them was prohibited by the Constitution.

Thus, when the *Brown* case arose, the scope of the bill of attainder provision had been elucidated by the several earlier decisions.

Seeing in the language of section 504 an exercise of specificity rather than rule making, the Court through Mr. Justice Warren indicated that the statute exceeded the power given Congress to regulate interstate commerce:

> The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics . . . shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.[14]

The Chief Justice cited the case of *Communist Party v. Subversive Activities Control Bd.*[15] for the implicit proposition that a statute which attempted to outlaw an organization by name

12. 57 Stat. 450 (1943).
13. 104 Ct. Cl. 557, 66 F. Supp. 142 (1945).
14. 85 Sup. Ct. 1707, (1965).
15. 367 U.S. 1 (1961).

rather than regulating certain designated activities would be held a bill of attainder. The statute actually considered in the *Subversive Activities Control Bd.* case was section 3 of the Subversive Activities Control Act of 1950,[16] the defining language of which was thought broad enough to escape constitutional condemnation. Since the fact of membership in the Communist party is not "semantically equivalent"[17] to having a tendency to incite political strikes, the Court in *Brown* was unwilling to approve the use of the word "Communist" as merely a shorthand way of reaching the characteristics covered.

Attempting to meet the reasoning of the dissent the Court stated that conflict-of-interest principles as applied in the case of *Board of Governors v. Agnew*[18] were not apposite here. In *Agnew*, petitioner was convicted under section 32 of the Banking Act of 1933[19] which forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank (no bill of attainder argument was discussed in the opinion). The Court observed that the statute in *Agnew* was neither based on any finding of guilt nor was it enacted as a penalty, but rather proceeded on the general knowledge of psychology that one who engaged in two potentially conflicting capacities would be subject to temptation and that many individuals would yield. The Court thus reasoned the banking statute was not a bill of attainder.

The Court discovered in the criminal sanctions of the labor act directed against persons instead of activities the fatal implication of legislatively determined guilt and punishment. Thus, in the Court's view one "guilty" of being a Communist was denied the right to serve as a union officer by way of punishment.

Section 504 of the 1959 act—making it criminal for a Communist to hold union office—replaced section 9(h) of the Taft-Hartley Act.[20] The purpose of section 9(h), a registration provision, was to prevent the so-called political strike by denying

16. Any organization in the United States... which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement... and (ii) operates primarily to serve the objectives of such world Communist movement. 64 Stat. 989 (1950), 50 U.S.C. § 782 (1958).

17. 85 Sup. Ct. 1707, (1965).

18. 329 U.S. 441 (1947).

19. 48 Stat. 194, as amended 12 U.S.C. § 78 (1959).

20. Labor Management Relations Act § 9(h), 61 Stat. 146 (1947), 29 U.S.C. § 159 (1952).

access to the National Labor Relations Board to trade unions whose officers refused to make annual affidavits that they were not members of the Communist party. Since the effectiveness of union activity would be diminished without the support of federal law, it was assumed that the provision would discourage the election of Communist officers and thus destroy the political strike as a tool of the world-wide Communist conspiracy. The submission of false affidavits is elsewhere made an offense.[21] Section 9(h) was tested against claims that it violated the first amendment freedoms of speech and assembly in the case of *American Communications Co. v. Douds*.[22] The Court there upheld the affidavit provision of the act, finding the potential disability imposed on Communists too slight an incident of the requirement when weighed against the national interest in the uninterrupted flow of commerce. Section 9(h) was seen as neither the mere withdrawal of the privilege of resort to a governmental board nor a licensing act. The possibility that some Communists may not have used union office as a device for obstructing commerce was not considered controlling, since, as the Court concluded, Congress could have found a substantial danger in Communist party members' holding union office. It was also held that section 9(h) did not constitute a bill of attainder.

In practice section 9(h) proved awkward to administer in that the yearly renewal of affidavits, with the attendant duplication on the election of new officers, was a condition precedent to resort to the labor board. Many leaders in the labor movement resented bitterly the implication of untrustworthiness in the oath requirement as well. It was also suspected that section 9(h) occasioned many pro forma resignations from party membership which were made for the purpose of giving a true statement that the individual was not "presently" a Communist. Section 9(h) was therefore generally considered to be an ineffective regulation of commerce.[23] It was thought that section 504 of the 1959

21. 18 U.S.C. § 1001 (1950).

22. 339 U.S. 382 (1950).

23. [The investigating Senate committee] believes that conditioning use of Board facilities on the filing of non-Communist affidavits has not been a satisfactory procedure. It has complicated and delayed the processing of cases before the Board and has had no material effort on improving safeguards against Communist infiltration.

S. Rep. No. 187, 86th Cong., 1st Sess. 35-36 (1959).

act would accomplish the end contemplated by section 9(h) in a more direct fashion.[24]

The reasoning which prevailed in *Brown* to hold section 504 an unconstitutional bill of attainder is subject to attack on at least two grounds. First of all, the approach of the Court does not adequately distinguish the *Agnew* case on the facts.

Secondly, the discovery by the Court of punitive purpose in section 504 is not satisfactorily made. The fundamental difficulty to meet is the clear history of the legislative provision as regulatory rather than punitive.

In this respect the *Brown* Court departs from the candor of the earlier cases.

PAUL R. HIBBARD

24. H.R. Rep. No. 741, 86th Cong., 1st Sess. 33 (1959); H.R. Rep. No. 1147, 86th Cong., 1st Sess. 36 (1959).

CONSTITUTIONAL LAW—Detention of Mail—Making addressee request that his mail be delivered held violative of first amendment—*Lamont v. Postmaster General* (Sup. Ct. 1965).

This case arises from divergent holdings in two different federal district courts. The addressees' mail had been detained by the Post Office Department as communist political propaganda[1] under the provisions of section 305(a) of the Postal Service and Federal Employees Salary Act of 1962.[2] In order to receive this mail, the addressees were required to return to the postal authorities a reply card requesting its delivery. This card indicated an addressee's desire to receive communist political propaganda, and after it was turned in he automatically received all future mail of this type without further detention. Instead of complying with this procedure, the addressees instituted a suit to enjoin the statute's enforcement. They were then notified by the post office that because of the suit, their mail would no longer be detained. One district court held that the question of first amendment abridgment had been mooted by the post office's subsequent delivery of the detained mail,[3] while the other held that the statute was unconstitutional on its face.[4]

1. "(j) The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." Foreign Agents Registration Act § 1 (j) (1938), 22 U.S.C. § 611 (j) (1959).

2. "(a). Mail matter, except sealed letters, which originates or which is printed, or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee. If no request for delivery is made by the addressee within a reasonable time, which shall not exceed sixty days, the matter detained shall be disposed of as the Postmaster General directs." Postal Service and Public Employees Salary Act § 305 (a) (1962), 39 U.S.C.A. § 4008 (a) (1962).

3. Lamont v. Postmaster General, 229 F. Supp. 913 (S.D.N.Y. 1964).

4. 236 F. Supp. 405 (N.D. Cal. 1964).

After these decisions were handed down, the Post Office Department changed its procedure under the statute by requiring the detention of every parcel regardless of whether the addressee had submittd a reply card. Thus, when the instant case reached the Supreme Court, the question of mootness was eliminated. On the remaining question of the statute's constitutionality, the Supreme Court, *held*, the statute was an unconstitutional limitation on the unfettered exercise of the addressees' first amendment rights. *Lamont v. Postmaster General*, 85 Sup. Ct. 1493 (1965). (6-to-2 concurring).[5]

The Court's observation that this statute conflicts with the uninhibited and wide open debate, contemplated by the first amendment,[6] appears to be a restatement of the rationale, used in *New York Times v. Sullivan*,[7] that the exchange of ideas must be encouraged. The Court considers that the first amendment is designed to protect all views, no matter how unpopular they are, because only through the exchange of ideas can needed political and social changes be made.[8] Previously, the Court has held that the first amendment protected the right to receive literature, as well as to disseminate it[9] and, thus, the mail is constitutionally protected on a par with speech.[10] The mail is not a privilege that the government can control at will,[11] but, rather, a withdrawal of mailing privileges denies a first amendment freedom.[12]

In *Lamont* the Court held that the statute's required reply card constituted a prior restraint, thus making the statute unconstitutional. In support of this holding the Court cited several similar instances of prior restraint, such as a flat license tax on door to door canvassing and solicitation,[13] and a city ordinance

5. A concurring opinion states that access to publications, though not an expressed right given by the first amendment, was a constitutionally protected right because it was necessary for the full exercise of expressed first amendment rights, and that not even the minutest interference with these first amendment rights could be tolerated absent overriding, constitutionally valid, governmental interests. Lamont v. Postmaster General, 85 S. Ct. 1493, 1947 (1965).

6. *Id.* at 1496-97.

7. 376 U.S. 254 (1964).

8. *Cf.* New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Thornhill v. Alabama, 310 U.S. 88 (1940).

9. Martin v. City of Struthers, 319 U.S. 141 (1943).

10. Lamont v. Postmaster General, 85 Sup. Ct. 1493 (1965); United States v. Burleson, 255 U.S. 407, 417 (1921) (dissenting opinion).

11. Hannegan v. Esquire, Inc., 327 U.S. 146 (1946); see Roth v. United States, 354 U.S. 476, 496 (1957) (dissenting opinion).

12. Speiser v. Randall, 357 U.S. 513 (1958).

13. Murdock v. Pennsylvania, 319 U.S. 105 (1943).

requiring a permit before literature could be distributed.[14] In *Thomas v. Collins*[15] the Court struck down a registration requirement that was a prerequisite to the making of a speech to solicit union members, even though it was not shown that permission, if applied for, would not be granted. Similarly in *Lamont* the mail would have been delivered when the reply card was returned. The Court reasoned that since a direct halting of the flow of mail was forbidden by the Constitution, an indirect method of achieving the same result should likewise be forbidden, and the required card was such an indirect method. Just as controlling the flow of ideas to the public through a licensing or taxing regulation is a denial of first amendment rights, so too controlling the flow of mail denies the same rights. "The addressee carries an affirmative obligation which we do not think the government may impose on him."[16]

There are several cases which have held that the first amendment does not guarantee an absolute right.[17] In *Breade v. City of Alexandria*[18] the Supreme Court upheld a municipal ordinance requiring that house to house solicitors be invited by the resident or obtain his permission before calling at his home. The Court declared that the city had a valid interest in protecting its citizens from annoyance, even though this interest limits the absolute right of free speech. Where there is a clear and present danger that some other constitutional right may be violated, limitation on free speech will be allowed.[19] For example, during a war the interests of the government are superior to unlimited speech.[20] Further, a city has the right to protect its citizens from annoying noise[21] and from the threat of riot and disorder.[22] In order for the Court to allow a limitation on the right of free speech, the danger must be clear and present, and must threaten paramount interests.[23] There must be a compelling constitu-

14. Lovell v. City of Griffin, 303 U.S. 444 (1938).

15. 323 U.S. 516 (1945).

16. Lamont v. Postmaster General, *supra,* note 10 at 1496.

17. *E.g.,* Breade v. City of Alexandria, 341 U.S. 622 (1951); Near v. Minnesota, 283 U.S. 697 (1931); Gitlow v. New York, 268 U.S. 652 (1925).

18. 341 U.S. 622 (1951).

19. Cantwell v. Connecticut, 310 U.S. 296 (1940); Schenck v. United States, 249 U.S. 47 (1919).

20. Abrams v. United States, 250 U.S. 616 (1919); Schenck v. United States, 249 U.S. 47 (1919).

21. Kovacs v. Cooper, 336 U.S. 77 (1949).

22. Feiner v. New York, 340 U.S. 315 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940).

23. Thomas v. Collins, *supra,* note 15 at 530.

tional interest before limitations on freedom of speech will be tolerated.[24]

Through the statute challenged in *Lamont* the government would have been able to eliminate the annoyance and irritation to persons who received this mail but who had not asked for it and did not want it. It appears that the protection of this interest was not paramount to the denial of free speech, nor does it appear that the sending of this propaganda gives rise to a grave abuse or a compelling overriding governmental interest.

ROBERT A. MCKENZIE

24. NAACP v. Button, 371 U.S. 415 (1963).

CORPORATIONS—Securities — Conversion of preferred into common held a sale within meaning of section 16(b)—*Blau v. Lamb* (S.D.N.Y. 1965).

Air-Ways Industries, Inc. offered to the shareholders of Lamb Industries, Inc. an exchange of one share of convertible preferred of Air-Ways for each five shares of Lamb Industries, Inc. common stock. The conversion rate was adjustable to protect the preferred shareholders' proportional interest against the diluting effects of possible splits or stock dividends in the common issue. The offer was in some part motivated by a desire to obtain for Air-Ways a management team then in the employ of Lamb Industries and to vest control of Air-Ways in Edward Lamb and his interests. Out of the consummated exchange and certain subsequent transactions a shareholder[1] of Air-Ways brought suit on behalf of the corporation to recover "short swing" profits from Edward Lamb, an insider by virtue of his position as officer, director, and member of the executive committee, and the Lamb family holding company, holding beneficial ownership of over ten percent of the outstanding common stock of Air-Ways.

The plaintiff contended that the series of maneuvers, whereby the defendants exchanged Lamb Industries common into Air-Ways preferred, and almost simultaneously converted into Air-Ways common at a work out rate of three and one half shares of common for each preferred share, and subsequently sold the common thus obtained within three months, constituted two counts of "purchase" and "sale" transactions within the meaning of section 16(b)[2] of the Securities Exchange Act by "insiders" rendering them liable to the corporation for such

1. An earlier action established the plaintiff's right to bring this action. Blau v. Lamb, 314 F.2d 618 (2d Cir. 1963).

2. For the purpose of preventing the unfair use of information which may have been obtained by such beneficial owner, director, or officer by reason of his relationship to the issuer, any profit realized by him from any purchase and sale, or any sale and purchase, of any equity security of such issuer (other than an exempted security) within any period of less than six months, unless such security was acquired in good faith in connection with a debt previously contracted, shall inure to and be recoverable by the issuer, irrespective of any intention on the part of such beneficial owner, director, or officer in entering into such transaction of holding the security purchased or of not repurchasing the security sold for a period exceeding six months....

Securities Exchange Act of 1934 § 16(b), 15 U.S.C. § 78p(b) (1963).

short swing profits.[3] *Held*, the voluntary conversion was both a purchase of the common and a sale of the preferred. *Blau v. Lamb*, 242 F. Supp. 151 (S.D.N.Y. 1965).

The significance of the holding that a voluntary conversion of preferred into common is a sale[4] is that this is the first case where that question has been squarely reached, and it clarifies a rather troublesome reconciliation of two earlier, important but seemingly divergent cases.

The defendant relied on the case of *Ashland Oil & Refining Co. v. Newman*,[5] contending that because of the inclusion of the anti-dilution feature, similar to one in *Ashland Oil*, the continuity of the initial investment was not broken; the issues were therefore economic equivalents; and, in effect, the conversion was not a sale. The court, however, distinguished *Ashland Oil* and reached the result recently presaged by *Heli-Coil Corp. v. Webster*,[6] where conversion of convertible debentures[7] was held a sale constituting the second half of a purchase-sale short swing.

At the time of the Cook and Feldman commentary in 1953,[8] the only case of a conversion falling within the ambit of section 16(b) was *Park & Tilford, Inc. v. Schulte*.[9] In that case the defendants were beneficial owners of a controlling majority of the common shares and a large block of convertible preferred which was convertible at a fixed rate and redeemable at a fixed price. In a time of rising prices of the common the corporation gave notice of a call. Before the redemption date the defendants converted into common and sold the common at a profit within six months. Conversion was held a purchase for the first half of the common stock transaction by reasoning that if conversion was not a purchase it would offer the speculative opportunity to

3. That the exchange was a purchase for the first half of the preferred stock transaction is well settled. See, *e.g.*, Stella v. Graham-Paige Motors Corp., 132 F. Supp. 100 (S.D.N.Y. 1955), *rev'd on other grounds* 232 F.2d 299 (2d Cir. 1956); Fistel v. Christman, 135 F. Supp. 830 (S.D.N.Y. 1955); Blau v. Hodgkinson, 100 F. Supp. 361 (S.D.N.Y. 1951).

4. Purchase and Sale are defined by the Act at § 3(a)(13)-(14), 15 U.S.C. § 78c(a)(13)-(14) (1963) as "any contract to buy, purchase, or otherwise acquire," and "any contract to sell or otherwise dispose of."

5. 163 F. Supp. 506 (N.D. Ohio 1957), *aff'd sub nom*, Ferraiolo v. Newman, 259 F.2d 342 (6th Cir. 1958), *cert. denied*, 359 U.S. 927 (1959) (only the shareholder appealed).

6. 222 F. Supp. 831 (D.C.N.J. 1963).

7. Convertible debentures are unexempted equity securities as defined by the Act at § 3(a)(10)-(12), 15 U.S.C. § 78c(a)(10)-(12) (1963).

8. Cook & Feldman, *Insider Trading Under the Securities Exchange Act*, 66 HARV. L. REV. 386, 612 (1953).

9. 160 F.2d 984 (2d Cir. 1947), *cert. denied*, 332 U.S. 761 (1947).

abuse inside information that the statute was designed to prevent. Important here was the persuasion that the defendants were in a position to control the call. Whether such conversion could also be considered a sale was left unanswered, but *Park & Tilford* appeared to be authoritative that all conversions were purchases.[10]

In 1954 *Roberts v. Eaton*[11] involved a complete reclassification of one class into two new classes of shares. This was not considered such a speculative opportunity as was within the statute and the reclassification was not considered a purchase. *Park & Tilford* was regarded in the light of the facts of the case as standing for the proposition that a "voluntary" conversion was a purchase but the case did not go so far as to hold that the absence of an individual option (to refuse the new security) was sufficient alone to be controlling. Moreover the fact that the exchange securities were new and had no independent value presented no speculative opportunity.

Ashland Oil & Refining Co. v. Newman[12] presented a similar fact situation to *Park & Tilford* but was distinguishable in two important particulars. The defendant director in *Ashland Oil* had acquired shares of convertible preferred with an anti-dilution feature, but the defendant did not possess sufficient ownership to exert control over the board. When the corporation gave notice that the preferred would be redeemed, he converted into common which he subsequently sold. The conversion was held not to be a purchase of the common. *Park & Tilford* was distinguished in that the preferred in that case had no existing market and the common received was more valuable in fact. In *Ashland Oil*, due to the anti-dilution feature and that both the preferred and the common were readily saleable, any rise in the price of the common would have a corresponding rise in the price of the preferred. Thus the shares exchanged were considered the economic equivalents of those received.[13] Further, the defendant in *Ashland Oil* did not have a controlling interest, as the defendants in *Park & Tilford* did, and was in no position to control the call.

Under the threat of the impending call each alternative disposition of the shares other than conversion was effectively

10. See Note, 10 SYRACUSE L. REV. 296 (1959).

11. 119 F. Supp. 362 (S.D.N.Y. 1953), *aff'd*, 212 F.2d 82 (2d Cir. 1954), *cert. denied*, 348 U.S. 827 (1954).

12. *Supra* note 5.

13. 259 F.2d 342, 345 (6th Cir. 1958).

closed. If the shareholder waited for redemption at a call price lower than the prevailing market price he would be forced into taking a loss. If he should sell the preferred at the market price he would be forced out of ownership entirely, losing the right to convert which he had purchased.[14] Conversion, then, was practically unavoidable.

Ashland Oil was thought to limit the application of *Park & Tilford* as a precedent for applying section 16(b) to conversions despite the distinctions and the reconciliation of the cases by the court.[15]

In the interim between *Park & Tilford* an important half step was taken in *Heli-Coil Corp. v. Webster*.[16] The defendant director held callable debentures which were convertible into common at the option of the holder. The debentures provided for an adjustable conversion rate. There was no call for redemption. Drawing from *Park & Tilford* the court logically concluded that if a conversion is a purchase of the exchange security, then, it is necessarily a sale of the convertible security.[17] The defendant contended that *Ashland Oil* controlled on that point in that there had been no change in their proportional interests. However, the court held that although many factors were cited in *Ashland Oil* as a basis for the decision it was obvious that the controlling factor was that of the involuntary nature of the conversion and that here the conversion was wholly voluntary.

Heli-Coil thus set the stage for *Blau v. Lamb*.[18] Turning to the anti-dilution feature in *Lamb* the court determined that the issues were not economic equivalents; that the receipt of common by the defendants significantly increased their investment position by giving them greater voting power, greater dividends, and increased marketability. "To put this another way, conversion into common required an investment decision based upon wholly different considerations than those involved in the decision to exchange for the preferred stock."[19] This makes it clear that the presence of an anti-dilution provision is too weak a safeguard to be controlling. Seldom, if ever, will preferred and common be equivalent unless the preferred is fully participating.

14. See 72 HARV. L. REV. 1392 (1959); 59 HARV. L. REV. 769 (1946).
15. 72 HARV. L. REV. 1392, 1394 (1959).
16. *Supra* note 6.
17. See in this respect Blau v. Lamb, 163 F. Supp. 528 (S.D.N.Y. 1958) where the implications are discussed in denying motions for summary judgment.
18. 242 F. Supp. 151 (S.D.N.Y. 1965).
19. *Id.* at 158.

In that case the existence of any preference would make it inadvisable to convert. It is the option to convert that creates the speculative opportunity to abuse inside information. The divergence from *Park & Tilford*, then, has come when the option aspect has become so diminished that conversion is practically imperative. In the present case:

> The element of involuntariness, so crucial to the decision in the Ashland Oil case, was totally absent here. Unlike the insider in Ashland Oil, Edward Lamb was in full control of the corporation whose shares were traded; indeed he was the guiding force behind the plan of exchange between Air-Way and Industries. . . . In addition, the exchange . . . served Lamb's long range goal of acquiring dominance of Air-Way. It requires little imagination to infer from such factors a corporate milieu rife with opportunities for speculation and misuse of inside information.[20]

Ashland Oil survives only in that it represents that "same flexible approach consistent with Section 16(b)'s purpose as has long been employed by the courts in varying factual patterns to construe the essential statutory concepts of purchase and sale."[21] The test that has evolved is whether the "transaction is of a kind which can possibly lend itself to the speculation encompassed by Section 16(b)."[22] Applying that test to the instant case the possibility of speculation is obvious. When conversion is involuntary there is no value in possessing inside information, but when it is truly optional it is in effect the same as selling the convertible security for cash, and purchasing common with the proceeds.

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20. *Id.* at 157.
21. *Ibid.*
22. *Ibid;* see Blau v. Lehman, 286 F.2d 786, 792 (2d Cir. 1960), *aff'd*, 368 U.S. 403 (1962).

DOMESTIC RELATIONS—Legality of Foreign Divorce—Mexican decree valid in New York where one party submitted to Mexican jurisdiction personally and one by attorney—*Rosenstiel v. Rosenstiel* (N.Y. 1965).

The plaintiff brought this action in New York to annul his marriage, claiming that a 1954 divorce obtained in Mexico by his wife's former husband was invalid. The former husband, Mr. Kaufman, had gone to El Paso, Texas where he registered at a hotel and the next day crossed the border to Juarez. There he signed the Municipal Register, an official book of residents of the city, and filed in the Mexican courts for a divorce based on incompatibility and ill treatment between the spouses. Neither of these constitute grounds for a divorce in New York.[1] After about an hour devoted to these formalities Mr. Kaufman returned to El Paso. The following day, his wife, the present defendant, appeared in court by an attorney duly authorized to act for her. An answer was filed in which she submitted to the jurisdiction of the court and admitted the allegations of her husband's complaint. The decree of divorce was made the same day and is recognized as valid by the Republic of Mexico. The trial court held that New York would not recognize the Mexican decree and granted judgment for the plaintiff thereby annulling the marriage. The Supreme Court, Appellate Division, reversed this judgment and dismissed the complaint.[2] In this case, which was one of first impression to the New York Court of Appeals, *held*, affirmed. Recognition of the validity of such a Mexican divorce violates no public policy of New York. *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709 (1965).[3] (4-to-2 concurring in part).

In the leading case of *Williams v. North Carolina*[4] the United States Supreme Court held that each state is required by the Constitution to give full faith and credit to matrimonial judgments of sister states. In the later case of *Sherrer v. Sherrer*[5] this doctrine was expanded, in that the acceptance of divorce decrees of one state by another must be unconditional if the parties took part in the divorce proceeding or were awarded full

1. New York permits divorce only for adultery. N.Y. Dom. Rel. Law § 170.
2. 21 App. Div. 2d 635, 253 N.Y.S.2d 206 (1964).
3. This case was decided with the companion case of *Wood v. Wood* in which the facts were similar.
4. 317 U.S. 287 (1942).
5. 334 U.S. 343 (1948).

opportunity to participate, and the divorce cannot be collaterally attacked in the state in which it was rendered.[6]

Recognition of foreign divorces, however, has been accorded only on the basis of comity. Comity is defined as "courtesy, complacence, respect, a willingness to grant a privilege, not as a matter of right, but out of deference and good will."[7] One of the leading cases on the recognition of a foreign divorce is that of the New York court in *Gould v. Gould*.[8] In this case, the parties, though New York domiciliaries, moved to France and resided there for five years. At the end of that time the husband sued for divorce in the French courts on the ground of adultery. The decree was awarded on the basis of the French court's application of New York law which was considered as being controlling. The New York court upheld the decree stating that no public policy was offended since the parties resided in France, the suit was not collusive, and the grounds were valid under New York law.

In recent years the problem of foreign divorces has become a major one, and the greatest controversy has centered around those obtained in Mexico.

The possibility of a Mexican divorce is attractive because in many states the permissible grounds for divorce are limited. Attempts to obtain a divorce in one of the more "lenient" states are often frustrated by residence requirements. Mexico, on the other hand, seems to offer every advantage for a quick and easy divorce. It is readily accessable and relatively inexpensive. The Mexican Code provides seventeen grounds for divorce, including that of mutual consent.[9] The primary advantage, however, is that of time. For instance, the laws of the State of Chihuahua, which contains the city of Juarez, provide that a local court shall be competent to grant a divorce if it is that of the residence of the plaintiff and such residence is proved by the signing of the Municipal Register.[10] Apparently under the law of Chi-

6. Courts have continued to determine independently whether the granting state had acquired jurisdiction over the parties. See Griswald, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193 (1951); Sumner, *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1 (1955).

7. Bobala v. Bobala, 68 Ohio App. 63, 71, 33 N.E.2d 845, 849 (1940).

8. 235 N.Y. 14, 138 N.E. 490 (1923).

9. Stern, *Mexican Divorces—The Mexican Law*, PRAC. LAW., May 1961, p. 78; 33 FORDHAM L. REV. 449, 463 (1965).

10. Ley de Divorcio de Chihuahua art. 24 (1933).

huahua it is even permissable for the parties to obtain a divorce by mail, without either ever having set foot in Mexico.[11]

Questions as to the validity of Mexican divorces have arisen in this country in three types of situations; the mail order decree, the *ex parte* decree and the so-called bi-lateral divorce.

No court in this country has ever upheld the validity of a mail order divorce.[12] The *ex parte* divorces, in which only one party participates, have been upheld where the plaintiff is actually a bona fide resident of Mexico and have been declared void where that requirement has not been met.[13] The situation with currently the most explosive possibilities is that of the "bi-lateral" divorce. Here, one party actually journeys to Mexico and becomes a resident while the action is pending (usually only a day) and the other appears through an authorized attorney. In 1938[14] New York lower courts began holding these divorces valid and from that time to 1964 it has been estimated that approximately 200,000 New Yorkers have been divorced by this means.[15]

Apparently only three states other than New York have directly considered this question.[16] New York, alone, has found this type of divorce valid.[17]

In *Rosenstiel*, the New York court felt that the prior lower court precedents and the number of New Yorkers who had relied on these put the state in a somewhat different position from other states. It was considered that in the mobile era in which we live, a marriage might be thought of as moving with the parties. Since jurisdiction of a court is the exercise of a sovereign power over a particular person and both parties submitted their case voluntarily to the Mexican courts, it would not seem to violate any public policy of New York to recognize that jurisdiction as valid. The court continued, saying that an artificial residence in Nevada, for instance, is hardly different

11. Ley de Divorcio de Chihuahua art. 23 (1933).

12. See, *e.g.*, Christopher v. Christopher, 198 Ga. 361, 31 S.E.2d 818 (1944); Caldwell v. Caldwell, 298 N.Y. 146, 81 N.E.2d 60 (1948).

13. *E.g.*, Harrison v. Harrison, 214 F.2d 571 (4th Cir. 1954); 33 FORDHAM L. REV. 449, 452-53 (1965).

14. Leviton v. Leviton, 6 N.Y.S.2d 535 (Sup. Ct.), *modified on other grounds*, 254 App. Div. 670, 4 N.Y.S.2d 992 (1938).

15. N.Y. Times, July 8, 1964, p.34, col. 2.

16. Warrender v. Warrender, 79 N.J. Super. 114, 190 A.2d 684 (App. Div. 1963), *aff'd*, 42 N.J. 287 (1963); Golden v. Golden, 41 N.M. 356, 68 P.2d 928 (1937); Bobala v. Bobala, 68 Ohio App. 63, 33 N.E.2d 845 (1940).

17. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709 (1965).

except in point of time. It is not truly significant of a difference in intent or purpose, or in effect.

The three other courts which have dealt with bi-lateral Mexican divorces had little difficulty in holding them void as violative of public policy since no residence or domicile had been established in fact. The Supreme Court of New Mexico stated the public policy argument succinctly:

> The state of New Mexico, the children, and the parties to the marriage are all equally concerned in the marriage status. The parties cannot throw off their marital ties as they would a worn out pair of shoes. Proper machinery of the court is set up to sever the marital bonds when they become beyond endurance, and even then only on statutory grounds. In the operation severing the bonds of matrimony, all interested parties are placed under the jurisdiction of a court of competent jurisdiction that the rights of all might be protected. To permit a foreign state or nation to assume jurisdiction over residents of this state and grant divorce upon request, like a slot machine in which you deposit a fixed sum of money, press the lever, and out comes a divorce decree, is a condition which New Mexico does not yet tolerate.[18]

After such a decision a court is also faced with the problem of whether the plaintiff is estopped to deny the validity of the Mexican decree since he participated in procuring the divorce. The best illustration of this is the 1963 New Jersey case of *Warrender v. Warrender*.[19] There, the plaintiff wife was suing her husband for separate maintenance. The husband claimed that a valid Mexican divorce had been granted. The facts of the divorce are similar to the New York case except that it was *the wife* who had gone to Mexico and obtained the decree. The court held that while the wife's actions were "reprehensible" and the "ill advised product of an emotional whim"[20] they were not sufficient to constitute an estoppel. The estoppel argument was also rejected in the Ohio and New Mexico cases.[21]

Although the specific problem of the Mexican divorce has arisen in only four states, it is probable that based on previous

18. Golden v. Golden, *supra* note 16 at —, 68 P.2d at 936.
19. *Supra* note 16.
20. 79 N.J. Super. 114, 122, 190 A.2d 684, 688 (App. Div. 1963).
21. Golden v. Golden, *supra* note 16; Bobala v. Bobala, *supra* note 16.

law regarding divorces obtained on a tourist basis, most states would reject the New York view.[22] In 1948, the National Conference of Commissioners on Uniform State Laws proposed for adoption the Uniform Divorce Recognition Act.[23] This act was specifically designed to discourage "migration in pursuit of a divorce." It was felt that a legislative declaration of policy specifically denying recognition to "tourist divorces" would cause "seekers after freedom to consider seriously whether they can acquire a valid divorce before setting out on their journey." In any event it would prevent a lawyer from advising that they could invoke the jurisdiction of an extra-territorial court without change of domicile.[24] Currently nine states have adopted the act in substance.[25] Unfortunately the results of the act have been disappointing. Few cases have relied on it as authority and it is a rare case where the act has been used as authority to invalidate a foreign divorce.[26]

No solution to the divorce problem has yet been found and state law continues to vary widely. Chief Justice Hudspeth stated in *Golden*[27] that the main difference between Mexican and local divorces is that the latter are a "home product." "It is the province of the legislature to make the law and establish the public policy with reference to divorce."[28] In New York, the only ground for a divorce for 160 years has been adultery. Although this law might be described as archaic, cruel, or worse, it is undoubtedly the public policy of the state subject to change

22. For a listing of cases see Commissioners' Notes, UNIFORM DIVORCE RECOGNITION ACT, 9A U.L.A. 275.

23. The act provides:

> 1. A divorce from the bonds of matrimony obtained in another jurisdiction shall be of no force and effect in this state, if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced. 2. Proof that a person obtaining a divorce from the bond of matrimony in another jurisdiction was (a) domiciled in this state within 12 months prior to the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced....

24. Commissioners' Notes, *supra* note 22 at 275.

25. California, Montana, Nebraska, New Hampshire, North Dakota, Rhode Island, South Carolina, Washington, and Wisconsin. UNIFORM DIVORCE RECOGNITION ACT, 9A U.L.A. 178 (Supp. 1964).

26. 33 FORDHAM L. REV. 449, 460-62 (1965); 16 HASTINGS L.J. 121, 129 (1964).

27. 41 N.M. 356, 68 P.2d 928 (1937) (concurring in part).

28. *Id.* at —, 68 P.2d at 940.

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only by the legislature. "No court is licensed to write a new state policy however attractive or convenient."[29] The court in *Rosenstiel* places a stamp of judicial approval on the actions of those affluent enough to circumvent New York law through a one day flight to Mexico.

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29. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, ___, 209 N.E.2d 709, 715 (1965). (Desmond, Ch. J., concurring in part).

FEDERAL JURISDICTION—Conflict between State Rule and Federal Policy in Diversity Cases in the Federal Courts—Federal policy outweighed state rule—*Szantay v. Beech Aircraft Corp.* (4th Cir. 1965).

Marie Szantay brought a wrongful death action against Beech Aircraft Corporation in the Federal District Court for the Eastern District of South Carolina. She alleged negligent design and manufacture of a Beech aircraft which had crashed, killing her husband.

Mrs. Szantay was a citizen of Illinois.

Beech was incorporated in Delaware, with its principal place of business in Kansas.

The accident occurred in Tennessee.

Beech challenged an adverse decision in the district court[1] on the ground that section 10-214,[2] the South Carolina "door-closing" statute, precluded maintenance of this action in the federal court. Clearly, the state courts of South Carolina would not have jurisdiction of this action under the provisions of section 10-214:

> An action against a corporation created by or under the laws of any other state, government or country may be brought in the circuit court: (1) By any resident of this state for any cause of action; or (2) By a plaintiff not a resident of this state when the cause of action shall have arisen or the subject of the action shall be situated within this State.

The question, then, was whether section 10-214 restricted the jurisdiction of the federal courts in South Carolina in diversity cases. *Held*, the state policy underlying enactment of section 10-214 was "uncertain" and was overridden by a stronger federal interest in providing a convenient forum for the adjudication of

1. Process was served on the South Carolina dealer for Beech, Hawthorne Aero Sales, Inc., and on the Secretary of State of South Carolina. Beech moved to quash service of process and to dismiss the complaint on the grounds that (1) the court had no jurisdiction because Beech was not incorporated in South Carolina and was not doing business in South Carolina; (2) that service on the Secretary was improper; and (3) that Hawthorne was not an agent of Beech and therefore service on Hawthorne was void. The District Court said that Beech was "present" in South Carolina (through Hawthorne) and was "doing business" in South Carolina; that service on the Secretary of State was effective; and that Hawthorne was an agent of Beech by virtue of the extensive control Beech exercised over Hawthorne (therefore service pursuant to section 10-423 of the South Carolina Code—"on any agent thereof"—was effective). Szantay v. Beech Aircraft Corp., 237 F. Supp. 393 (E.D.S.C. 1965).

2. S.C. CODE ANN. § 10-214 (1962).

the plaintiff's rights. *Szantay v. Beech Aircraft Corp.*, 349 F.2d 60 (4th Cir. 1965).

This case "invokes the ubiquitous specter of *Erie R.R. v. Tompkins* and poses the recurring problem of properly adjusting state and federal interests in the federal system."[3] *Erie*, decided in 1938, required the application of state substantive law by a federal court in diversity cases involving state created rights. The "substance"—"procedure" distinction enunciated by *Erie* was not satisfactory, however, in cases where the difference between these categories was unclear. In *Guaranty Trust Co. v. York*,[4] the United States Supreme Court expanded *Erie* to require that a federal court in diversity cases involving state created rights apply the state rule if its application would affect the outcome of the litigation. This "outcome determinative" rule was aimed at uniformity in result between state and federal courts, and it made the federal court "another court of the state."[5]

Guaranty Trust was decided in 1945. In 1958 a South Carolina case that was to further develop the law in this area reached the Supreme Court. *Byrd v. Blue Ridge Rural Elec. Co-Op.*[6] concerned the conflict between a state procedural rule that required the judge to decide employer immunity from the Workman's Compensation Act, and the federal policy, found in the seventh amendment, of resolving factual disputes with a jury. The federal policy prevailed, and the "affirmative countervailing considerations" rule was born. The court said that the policy of uniform enforcement of state created rights, stated in *Guaranty Trust*, did not exact compliance with a state rule "which disrupts the federal system of allocating functions between judge and jury," when it is determined that the state rule was not bound up with state rights and obligations in such a way as to compel its application.

In light of these decisions, Judge Sobeloff, writing for the Fourth Circuit in the instant case, considered it appropriate to make the following analysis in resolving a state-federal conflict in a diversity case:

3. *Federal Jurisdiction over Foreign Corporations and the Erie Doctrine*, 64 COLUM. L. REV. 685 (1964).
4. 326 U.S. 99 (1945).
5. *Id.* at 108.
6. 356 U.S. 525 (1958).

1. If the state provision, whether legislatively adopted or judicially declared, is the substantive right or obligation at issue, it is constitutionally controlling.[7]

2. If the state provision is a procedure intimately bound up with the state right or obligation, it is likewise constitutionally controlling.[8]

3. If the state procedural provision is not intimately bound up with the right being enforced but its application would substantially affect the outcome of the litigation,[9] the federal diversity court must still apply it unless there are affirmative countervailing federal considerations.[10] This is not deemed a constitutional requirement but one dictated by comity.

On the first point, Judge Sobeloff noted that the parties were in agreement that the door closing statute was procedural. On the second point: since the right asserted (recovery under the Tennessee wrongful death statute) arose under Tennessee law, the South Carolina door-closing statute was not intimately bound up with that right. Point number two was, therefore, not applicable.

Point three required a determination of the importance of the South Carolina rule in the light of state policy. Judge Sobeloff said that "the state's reason for enacting its door-closing statute is uncertain."[11] In contrast to this absence of any discoverable state policy behind the statute was the presence of several federal considerations: first, the constitutional extension of subject matter jurisdiction in diversity cases to the federal courts in order to avoid discrimination against non-residents (the effect of section 10-214 here was to discriminate against non-residents); second, the enforcement in each state of obligations and rights created by sister states (the application of section 10-214 would prevent enforcement of the Tennessee wrongful death statute in South Carolina); and, third, the promotion of efficient joinder in multi-party actions.[12]

7. This is, of course, the *Erie* rule.

8. This is stated in *Byrd.*

9. This is from *Guaranty Trust.*

10. This is the holding of *Byrd.*

11. Judge Sobeloff could find no legislative history on the statute and no South Carolina Case which interpreted it.

12. Plaintiff had also sued Dixie Aviation, a South Carolina service organization located at the Columbia airport, which had serviced the aircraft before

Judge Sobeloff appears not to be of the opinion that federal policy against section 10-214 outweighed any state policy for it, but rather that compelling federal reasons existed for allowing the action while state policy against such an action was lacking.

Two Supreme Court cases, cited by Beech in support of application of the South Carolina statute, appear on first examination to conflict with Judge Sobeloff's resolution of the instant case. In *Angel v. Bullington*[13] the state statute barred recovery in state courts of deficiency judgments on foreclosure sales; in *Woods v. Interstate Realty Co.*[14] the state statute prevented out-of-state corporations which had not qualified to do business from bringing any action in the state courts. The statutes were applied in both cases.

Judge Sobeloff distinguishes these two cases by saying they involved "a clear state policy that would have been frustrated by permitting suit in a federal court," and that neither involved discrimination against non-residents, or multiple defendants suable only in the contested forum. In other words, *Angel* and *Woods* involve clear state policy; the instant case involves superficial policy[15] at best.

Thus, it seems that the relative importance of state and federal policy is the determinative factor in cases of state-federal conflict in diversity cases, if the state rule does not involve a substantive right and is not a procedure intimately bound up with a state right or obligation. The answer to a problem of state-federal conflict in the application of a rule of procedure in diversity cases involving state created rights is, therefore, a reasonable evaluation of relative importance: if the state procedural rule, not intimately bound up with a state right, reflects a clear and legitimate state policy it must be applied; if it does not, or if it is outweighed by strong federal policy, the federal rule must be applied. The nature of the state-federal relationship dictates such an imprecise rule.

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its departure from Columbia. South Carolina was the only state where Beech and Dixie could both be sued in the same action. Application of section 10-214 would eliminate Beech as a party in this action and Szantay would have to sue Beech in Kansas or Delaware.

13. 330 U.S. 183 (1947).

14. 337 U.S. 535 (1949).

15. The superficiality is shown by the fact that the plaintiff could have gotten into the South Carolina courts simply by qualifying as administrator under South Carolina law.

INSURANCE—Construction of "Use" and "Other Insurance" Clauses—*Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp.* (S.C. 1965).

A bag boy, employed by Wrenn & Outlaw Inc. (Wrenn), negligently slammed a car door on a supermarket customer's hand. The bag boy was in the process of loading groceries in the car when the accident occurred. The customer instituted a suit against Wrenn for the injury. Wrenn was insured by Harleysville Mutual Casualty Company (Harleysville) who defended the suit. The customer's automobile liability insurer, Employers, had refused to defend the customer's action against Wrenn. Under the familiar loan receipt arrangement[1] Wrenn brought this suit against Employers' for recoupment. The trial court dismissed the action. On appeal to the South Carolina Supreme Court, *held*, reversed. Wrenn was afforded protection by Employers' omnibus clause and this policy provided the primary coverage. *Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp.*, 142 S.E.2d 741 (S.C. 1965). (5-to-0).

To hold that Employers' policy covered Wrenn required a finding that the loading of the groceries by the bag boy was a "use" within the omnibus clause.[2] The court decided that the "use" here was grocery shopping and that loading was part and parcel of the use to which the automobile was then being put.[3] Such a common "use" of an automobile seems clearly within the terms of the policy, especially in light of an earlier South Carolina case which considered a similar omnibus clause.[4]

1. Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741, 742 (S.C. 1965). In the appeal the defendant argued that Wrenn was not the real party in interest. The court rejected this contention relying on Martin v. McLeod, 241 S.C. 71, 127 S.E.2d 129 (1962) where a similar loan receipt was sustained against this defense.

2. The policy provided coverage for injury "sustained by any person... arising out of the... use of the owned automobile." In addition to the named insured protection was afforded "any other person using such automobile" and any "organization legally responsible for the use of the owned automobile." The policy definitions of "use" included loading and unloading. Since Wrenn was legally responsible for the acts of its employee, coverage would be provided if the bag boy was "using" the owned automobile. Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741, 743 (S.C. 1965).

3. Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741, 743 (S.C. 1965).

4. See Coletrain v. Coletrain, 238 S.C. 555, 121 S.E.2d 89 (1961). In this case it was held that a taxicab passenger, who slammed the door on his wife's hand as they were getting out of the cab, was "using" the taxicab within the loading provision of the cab's omnibus clause. The court in *Wrenn, supra* note 3 at 743-44, distinguished two cases relied on by the lower court which reached a contrary result. Commercial Standard Ins. Co. v. New Amsterdam Cas. Co., 272 Ala. App. 357, 131 So. 2d 182 (1961) (where the act of loading had been

The novel question in this state decided by this case concerned the other insurance clauses present in both policies. Since the customer's automobile policy (Employers') afforded Wrenn protection, it had to be determined whether their coverage was "primary, pro rata or secondary in connection with the coverage" to Wrenn by Harleysville.[5]

Both policies contained standard pro rata clauses.[6] Also each policy provided that as to non-owned automobiles the coverage was to be excess over "any other valid and collectible insurance."[7] The excess clause of Employers' policy did not apply because the automobile was owned by the customer, the named insured. Employers' pro rata clause could only apply if Wrenn had other insurance. The court reasoned that Harleysville's policy did not provide Wrenn with other insurance within Employers' pro rata clause because Harleysville's policy as to non-owned automobiles was expressly declared to be excess and, consequently, could not be "other valid and collectible" insurance. The primary coverage therefore was the responsibility of Employers'.[8]

The rationale adopted by the South Carolina Supreme Court conforms with the majority of authority where the conflict is between a pro rata and an excess other insurance clause.[9]

There are three basic types of other insurance clauses: The pro rata clause,[10] the excess clause,[11] and the escape or "no liability" clause.[12]

The factual situations that present a conflict between these clauses occur, for example, where someone is negligently injured

completed) and Travelers Ins. Co. v. Safeguard Ins. Co., 346 Mass. 622, 195 N.E.2d 86 (1964) (where the omnibus clause did not contain a loading and unloading provision).

5. Wrenn & Outlaw Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741, 744 (S.C. 1965).

6. If the insured has other insurance against a loss covered by the policy, the insuring company shall not be liable under its policy for a greater proportion of such loss than the applicable limit of liability stated bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

Ibid.

7. *Ibid.*

8. *Ibid.*

9. See American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958); 8 APPLEMAN, INSURANCE LAW AND PRACTICE § 4914 (1942). *Contra,* Lamb-Weston Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110 (1959). For a review and analysis of the pertinent cases see Annot., 76 A.L.R.2d 502 (1961).

10. See generally 7 AM. JUR.2d *Automobile Insurance* § 200 (1963).

11. *Id.* § 201.

12. *Ibid.*

where the owner of an automobile lends his car to another,[13] or where the relationship of lessor-lessee exists and an accident occurs,[14] or where, as in the instant case, the owner of the automobile is injured by a person loading the car.[15] In all these situations the parties involved in the accident may have coverage under more than one insurance company's policy.

The cases differ as to the rule to apply when faced with such facts. One court has said that the insurer whose coverage which is more specific is liable where there was an excess versus a pro rata clause.[16] Another has declared, where there was an excess and an escape provision, that the other insurance clause more generally worded will provide coverage.[17] Some courts have adopted the rather arbitrary rule that the insurance company whose policy was first issued will cover the loss where there is an excess and an escape clause in conflict.[18] Others have ruled that the liability falls on the insurer who covered the ultimate tortfeasor where there was an excess and a "no liability" clause.[19] In one case an excess and an escape provision were declared mutually repugnant and the loss was prorated between the insurers.[20] The same result was reached by the Oregon court where there was a pro rata versus an excess clause.[21]

The reasoning in the instant case, where there was a pro rata as against an excess clause, is different from the seemingly irreconcilable decisions above. This theory interprets the excess provision as not constituting other valid and collectible insurance thereby not allowing the pro rata clause to apply and, consequently, the policy with the pro rata clause bears the lia-

13. Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

14. American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958).

15. Wrenn & Outlaw, Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741 (S.C. 1965).

16. Trinty Universal Ins. Co. v. General Acc., Fire & Life Assur. Corp., 138 Ohio St. 488, 35 N.E.2d 836 (1941) (dictum).

17. Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717 (7th Cir. 1941).

18. See, *e.g.*, New Amsterdam Cas. Co. v. Hartford Acc. & Indem. Co., 108 F.2d 653 (6th Cir. 1940).

19. Maryland Cas. Co. v. Bankers Indem. Ins. Co., 51 Ohio App. 323, 200 N.E. 849 (1935).

20. Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

21. Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 341 P.2d 110 (1959).

bility to the limits of its policy.[22] Taking an opposite view, some courts have said that the interpretation of such clauses is "like pursuing a will o' the wisp"[23] or is similar to the question of "which came first the hen or the egg."[24] It would seem the rationale applied by the South Carolina Supreme Court is certainly more satisfactory in legal analysis.

The South Carolina law appears settled by the instant case that if there is coverage by two insurance policies, one of which is excess over all other valid and collectible insurance, and the other policy only contains a pro rata clause, that the latter company bears the loss to the limits of its policy. The excess insurance is not other valid and collectible insurance; therefore, the pro rata clause is not applicable because there is no other insurance for the proration. It may be suggested, that with regard to the insurance company who provides extended coverage, the solution is to be positive that the insurance will be excess under any factual situation.[25] Where the courts are faced with both excess or no liability clauses applicable, they have not left the insured without coverage, but have declared the clauses mutually repugnant and prorated the loss.[26] This would certainly be more profitable for an insurance company than to suffer the loss to the limits of its policy, as in the instant case, before the other insurance company's excess coverage could be reached.

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22. Wrenn & Outlaw, Inc. v. Employers' Liab. Assur. Corp., 142 S.E.2d 741 (S.C. 1965), *accord,* American Sur. Co. v. Canal Ins. Co., 258 F.2d 934 (4th Cir. 1958); McFarland v. Chicago Express, Inc., 200 F.2d 5 (7th Cir. 1952).

23. Lamb-Weston, Inc. v. Oregon Auto. Ins. Co., 219 Ore. 110, 122, 341 P.2d 110, 115-16 (1959) where there was a pro rata clause versus an excess clause the court declared the clauses repugnant and prorated the loss.

24. Zurich Gen. Acc. & Liab. Ins. Co. v. Clamor, 124 F.2d 717, 719 (7th Cir. 1941) where there was an excess and an escape or no liability clause.

25. One such provision could be:

> This insurance is hereby declared to be excess over any other valid and collectible insurance available to the named insured or any other person or property covered by this policy, whether in respect to the owned automobile or otherwise or against any other losses which this policy is intended to cover.

26. See, *e.g.,* Oregon Auto. Ins. Co. v. United States Fid. & Guar. Co., 195 F.2d 958 (9th Cir. 1952).

INSURANCE—Automobile Collision Coverage—Definition of Collision—Unpaid for clause not used in determining coverage afforded by insuring clause—*Jones v. Virginia Sur. Co.* (Mont. 1965).

The plaintiff's truck was damaged by a falling limb cut by a logging contractor. The truck was insured by a policy issued by the defendant insurer. The policy included both collision and comprehensive provisions but the plaintiff had purchased only the former. While the collision clause made no mention of falling objects,[1] the unpurchased comprehensive clause specifically excluded from the collision clause loss caused by falling objects.[2] The plaintiff sued the defendant insurer on the theory that his collision coverage was broad enough to cover the damage to his truck and that the comprehensive clause did not form part of his insurance contract. The trial court held for the defendant. On appeal to the Supreme Court of Montana in a case of novel impression, *held*, reversed. There was a "collision" with an "object" and the comprehensive clause did not determine the coverage of the collision clause. *Jones v. Virginia Sur. Co.*, 401 P.2d 570 (Mont. 1965). (3-to-2).

While there are many automobile property damage policies which include damage caused by collision and the law is relatively clear as to whether a collision has occurred, the precise question of recovery for damage where the vehicle was struck by a falling object has seldom arisen.[3] However, in the few cases where the issue has arisen, it is usually held that if the force which causes the object to fall on the vehicle is a natural one, a collision has *not* occurred.[4] On the other hand, if a human force caused the object to fall, the collision requirement is met.[5]

1. "Coverage E—Collision or Upset: To pay for direct and accidental loss... to the automobile... caused by collision... with another object...."

2. "Coverage D—Comprehensive Loss of or Damage to the automobile, Except by Collision or Upset: To pay for direct and accidental loss... to the automobile... except loss caused by collision... [L]oss caused by... falling objects... shall not be deemed loss caused by collision or upset."

3. Annot., 54 A.L.R.2d 381 (1957).

4. Jacobs v. Camden Fire Ins. Ass'n., 135 F. Supp. 837 (W.D. Pa. 1955); Mercury Ins. Co. v. McClellan, 216 Ark. 410, 225 S.W.2d 931 (1950); Ohio Hardware Mut. Ins. Co. v. Sparks, 57 Ga. App. 830, 196 S.E. 915 (1938); Chandler v. Aetna Ins. Co., 188 So. 506, (La. App. 1939); American Auto. Ins. Co. v. Baker, 5 S.W.2d 252 (Tex. Civ. App. 1928); O'Leary v. St. Paul Fire and Marine Ins. Co., 196 S.W. 575 (Tex. Civ. App. 1917); see Providence Washington Ins. Co. v. Proffitt, 150 Tex. 207, 239 S.W.2d 379 (1951), in which the court recommends that the insuring clause be drawn to specifically exclude accidents caused by natural forces.

5. Interstate Cas. Co. v. Stewart, 208 Ala. 377, 94 So. 345 (1922); Teitelbaum v. St. Louis Fire and Marine Ins. Co., 266 Ill. App. 237, 15 N.E.2d

In *Jones* the court had little difficulty in holding that from the facts normally a "collision" could be considered as having occurred. This presented the court squarely with the problem of whether the parties had intended a different interpretation by leaving the listed comprehensive clause unpurchased. On this question the law is unclear.

Barnard v. Houston Fire and Cas. Ins. Co.[6] held that an unpaid for clause is not part of the contract and can not be used to determine intent. Further, intent is unimportant if there is no definite exclusion in the insuring clause.

In agreement with *Barnard*, a recent Tennessee case pointed out that the plaintiff could not rely on the unpaid for provision to sustain her suit and held that the defendant insurance company could not use the unpaid for provision as a defense.[7]

One writer[8] has stated that two false assumptions must be made before the intent of the parties can be determined from the unpurchased coverage. One must assume not only that the insured has read all the coverage offered in the policy, but that he read the coverages as being mutually exclusive. This may, however, produce harsh results for the insured. He might be denied coverage where consideration of the policy as a whole would otherwise permit recovery.[9]

In opposition to *Barnard*, *Fischer v. California Ins. Co.*[10] held that the entire printed contract must be viewed in determining intent. The court considered insurance policies as subject to the same rules of construction as other contracts. All sections should be construed as a whole, not a series of separate parts. In two earlier cases,[11] it was held that policies are purposely written so that a choice of coverages is available to the buyer and that when he buys one he excludes the other. He is making a definite decision, and this decision is an important indication

1013 (1938); Barnard v. Houston Fire and Cas. Ins. Co., 81 So.2d 132 (La. App. 1955); Universal Ser. Co. v. American Ins. Co., 213 Mich. 523, 181 N.W. 1007 (1921); Pohl v. Commercial Ins. Co., 36 Misc. 2d 173, 232 N.Y.S.2d 92 (Sup. Ct. 1962); Concordia Fire Ins. Co. v. Smith, 205 Okla. 344, 237 P.2d 1013 (1951); 5 APPLEMAN, INS. LAW AND PRACTICE, § 3201 (1941); 45 C.J.S. *Insurance* § 797 (1946).

6. 81 So. 2d 132, (La. App. 1955).

7. Central Nat'l Ins. Co. v. Adams, 45 Tenn. App. 23, 319 S.W.2d 486 (1958).

8. 24 U. CHI. L. REV. 170 (1956).

9. *But see* Saul v. St. Paul Mercury Indem. Co., 176 Kan. 679, 250 P.2d 819 (1952).

10. 236 Ore. 376, 388 P.2d 441 (1964).

11. Ohio Hardware Mut. Ins. Co. v. Sparks, 57 Ga. App. 830, 196 S.E. 915 (1938); Chandler v. Aetna Ins. Co., 188 So. 506 (La. App. 1939).

of his intent. In *Mercury Ins. Co. v. McClellan*,[12] by looking at the unpaid for portions which provided for protection against windstorm, it was clear to the court that the plaintiff did not intend to pay for windstorm protection and that the defendant did not intend to assume the risk of such damage to the automobile.

The case of *United States Ins. Co. v. Boyer*,[13] presents a thoughtful and convincing discussion of the problem. This court stated that the insurance commission must approve the wording of all policies. The commission could provide for one all-inclusive risk policy and give the public the choice of that or nothing; but the commission has not done this. For example, the commission has attempted to divide the risks and allow the public the opportunity of buying collision without buying windstorm protection. If the impact of objects blown through the air by the wind is a collision, why should anyone buy collision and windstorm protection? Under present methods insurance premiums are governed by loss experience. Therefore, if one looks only to the paid for collision provision, without looking to see that the insured had the opportunity of buying windstorm protection, loss from windstorm in the collision coverage may be included. The premium rate on collision would be driven up by including losses from windstorm in the collision loss experience, making it impossible for the public to buy collision without paying for some windstorm coverage. Contrary to the best interests of the public this would produce one all-inclusive risk policy.

Justice Cardozo stated with regard to insurance contracts, "Our guide is the reasonable expectation and purpose of the ordinary business man when making ordinary business contracts. It is his intention, expressed or fairly to be inferred, that counts."[14]

One has the duty and responsibility of determining the contents of a written contract before he signs it.[15] A logical reading would show that comprehensive covers all the listed occurrences, while collision covers only those losses that are not in the list.[16]

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12. 216 Ark. 410, 225 S.W.2d 931 (1950).

13. 153 Tex. 415, 269 S.W.2d 340 (1954).

14. Bird v. St. Paul Fire and Marine Ins. Co., 224 N.Y. 47, 51, 120 N.E. 86, 87 (1918).

15. 17 C.J.S. *Contracts* § 137 (1939).

16. Jones v. Virginia Sur. Co., 401 P.2d 570 (Mont. 1965) (dissenting opinion).

TORTS—Libel—Verdict for defamation of state employee unaffected by *New York Times Co. v. Sullivan* because issue not raised at trial level—*Curtis Publishing Co. v. Butts* (5th Cir. 1965).

On March 23, 1963, Curtis Publishing Company published an article in the *Saturday Evening Post* entitled "The Story of a College Football Fix," and subtitled "A Shocking Report of How Wally Butts and 'Bear' Bryant Rigged A Game Last Fall." Butts sued for libel stemming from the accusations and innuendoes contained in this article. He was awarded sixty thousand dollars general damages and three million dollars punitive damages. The United States District Court held that the award of punitive damages was excessive and required Butts to remit all in excess of four hundred thousand dollars. Curtis' motion for a new trial on the ground that its constitutional rights had been violated was overruled. On appeal to the United States Court of Appeals, *held*, affirmed. The defendant had clearly waived any right it may have had to challenge the verdict on constitutional grounds and the award of punitive damages was not so affected by passion and prejudice that it could not be corrected by remittitur *Curtis Publishing Co. v. Butts*, ___ F.2d ___ (5th Cir. 1965). (2-to-1).

The defendant's principal contention was that, based on *New York Times Co. v. Sullivan*,[1] his constitutional guarantees of freedom of speech and press had been violated.[2]

It is generally recognized in the law of libel that there is a qualified privilege of fair comment on matters of public concern. This privilege is limited to those matters which are of legitimate concern to the community as a whole because they affect the interest of the entire community.

The chief controversy has been whether the privilege extends to misstatements of fact as distinguished from those which ex-

1. 376 U.S. 254 (1964). Noted in 14 AM. U.L. REV. 71 (1964); 31 BROOKLYN L. REV. 191 (1964); 44 B.U.L. REV. 563 (1964); 14 DE PAUL L. REV. 181 (1964); 48 MARQ. L. REV. 128 (1964); 26 MONT. L. REV. 110 (1964); 10 N.Y.L.F. 249 (1964); 38 So. CAL. L. REV. 349 (1965); 16 SYRACUSE L. REV. 132 (1964); 42 TEXAS L. REV. 1080 (1964); 2 TULSA L.J. 79 (1965); 113 U. PA. L. REV. 284 (1964); 9 VILL. L. REV. 534 (1964).

2. Curtis also contended that the use of the remittitur to reduce the award of punitive damages was an improper exercise of discretion by the district judge. The court held that the district judge could well have found that the jury was not so affected by passion and prejudice that the excessive judgment could not be cured by remittitur, and that he had not abused his discretion.

press only an opinion.[3] The majority of the courts that have considered the question have held that the privilege is limited to opinion, comment, or criticism and does not extend to false assertions of fact. A number of jurisdictions have reached the opposite conclusion,[4] and most of the scholars who have considered the question have accepted this minority view.[5] A few jurisdictions followed a "limited minority" approach in the so-called "public official" rule. Under this principle factual remarks about a *public official* were privileged unless they reach a certain degree of seriousness.[6] One court has stated that this privilege exists unless the charge "is of such a nature that if true it would cause his removal from public office."[7]

The minority view was vindicated and the majority view completely overthrown by the United States Supreme Court in *New York Times Co. v. Sullivan.*[8] There the Court held that in order for a public official to recover damages he must prove that the statement against his official conduct was published "with actual malice—that is, knowledge that it was false or with reckless disregard of whether it was false or not."[9] *Times* allows, at least as to public officials, the privilege of fair comment to extend to false assertions of fact if there is a reasonable belief in the truth of the matters asserted.

Based on the *Times* case Curtis contended that its constitutionally guaranteed freedoms had been abused. However, without deciding or expressing an opinion as to whether *Times* fundamentally changed the substantive law applicable to libel cases in Georgia, whether the charge of malice given by the district judge was adequate under *Times*, or whether Butts was the kind of public official contemplated by *Times*, the court affirmed the judgment on a procedural technicality—the date of the *Times*

3. PROSSER, TORTS 812-16 (3d ed. 1964).

4. Noel, *Defamation of Public Officers and Candidates,* 49 COLUM. L. REV. 875, 896-97 (1949) lists twenty-six states that follow the majority view and nine in the minority. Professor Noel includes Georgia in the majority and cites Kirkland v. Constitutional Publishing Co., 38 Ga. App. 632, 144 S.E. 821 (1928) in support of this position.

5. See, *e.g.,* Chase, *Criticism of Public Officers and Candidates for Office,* 23 AM. L. REV. 346 (1889); Hallen, *Fair Comment,* 8 TEXAS L. REV. 41, (1929); Smith, *Charges Against Candidates,* 18 MICH. L. REV. 1 (1919).

6. Noel, *supra* note 4 at 901.

7. Cotulla v. Kerr, 74 Tex. 89, 94, 11 S.W. 1058, 1059 (1889). A later federal case governed by Texas law applied this rule in Sweeney v. Caller-Times Publishing Co., 41 F. Supp. 163 (S.D. Tex 1941).

8. 376 U.S. 254 (1964).

9. *Id.* at 279-80.

decision coupled with the relationship of the parties involved constituted a waiver of the constitutional guarantee.

The defendant did not assert the violation of his constitutional rights until after the judgment when he made a motion for a new trial. Formerly certiorari had been granted to *Times* by the Supreme Court, but the decision was not rendered until after the jury in the *Curtis* case had returned the verdict and judgment.[10] A Birmingham, Alabama law firm represented the New York Times Company in its suit against Sullivan and represented Curtis Publishing Company in another suit which had been filed against it by Coach Bryant. A member of this firm had sent information to Curtis about the alleged telephone conversation between Butts and Bryant[11] and had talked to the author of the story prior to its publication. This individual, along with another member of the firm, sat at Curtis' counsel table throughout the trial of this case.

As a result of this "interlocking battery of able and distinguished attorneys,"[12] the court felt that Curtis was fully aware "that the constitutional questions it now argues had been for some time, and were still being, vigorously asserted in *Times*."[13] Curtis had had its day in court. In *Michel v. Louisiana*[14] the test in making a claim to a constitutional right was "whether the defendant has had a reasonable opportunity to have the issue as to the claimed right heard and determined by the . . . court." The Supreme Court had previously held, in *Yakus v. United States*,[15] that "no procedural principle is more familiar to this court than that a constitutional right may be forfeited . . . by a failure to make timely assertion of that right." The court of appeals in the *Butts* case thus held that Curtis's silence amounted to the "intentional relinquishment . . . of a known right or privilege."[16]

10. *New York Times Co. v. Sullivan* was decided by the Alabama Supreme Court on August 30, 1962 and petition for certiorari in the United States Supreme Court was granted on January 7, 1963. On March 25, 1963 the complaint in the instant case was filed, and the verdict and judgment was rendered on August 20, 1963. The *Times* decision was not rendered until March 9, 1964.

11. The story was based on an alleged telephone conversation between the two coaches in which Butts gave information to Bryant concerning Georgia plays and characteristics of some of the Georgia players.

12. Curtis Publishing Co. v. Butts, ___ F.2d ___ (5th Cir. 1965).

13. *Id.* at ___.

14. 350 U.S. 91, 94 (1950).

15. 321 U.S. 414, 444 (1944).

16. Curtis Publishing Co. v. Butts, ___ F.2d ___ (5th Cir. 1965), quoting from Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

In a strong dissenting opinion Judge Rives sharply disagreed with the majority on the issue of waiver. There can be a waiver or relinquishment only of a known right,[17] and Curtis could hardly be said to have waived a constitutional right not enunciated at the time. *New York Times Co. v. Sullivan* was, in his opinion, directly in point and required reversal. He felt that Butts was a public official as contemplated by *Times*. As an employee of the state hired to guide and educate young men, the criticism was of his official conduct within the *Times* rule, and the charge to the jury by the district judge did not embrace the *Times* definition of actual malice.[18]

The major question left open by this case is whether Butts was a public official as contemplated by *Times*. There is no indication in *Times* of how far down the ranks of government employees the public official doctrine is intended to extend. The Court merely held that the plaintiff's position as an elected city commissioner clearly included him in this category.[19] In *Garrison v. Louisiana*, however, the Supreme Court further extended *Times* by declaring that public officials are not limited to elected officials.[20] It is now imperative that a line be drawn. To include Wally Butts in the category of public official would be a dangerous extension of a rule that some authorities believe serves no useful purpose and should be abandoned.

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17. Johnson v. Zerbst, 304 U.S. 458 (1938); *cf.* Fay v. Noia, 372 U.S. 391 (1963).

18. Curtis Publishing Co. v. Butts, ___ F.2d ___ (5th Cir. 1965) (dissenting opinion).

19. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

20. 379 U.S. 64 (1964). The defamed individuals in this case were eight judges of the Criminal District Court of New Orleans.